ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98	

OPPOSITION TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION

The California Cable Television Association ("Association" or "CCTA") hereby opposes the Petition for Reconsideration and Clarification of Pacific Gas & Electric Company ("PG&E").[1] CCTA's opposition focuses on PG&E's request that the Commission afford states *carte blanche* right to exempt the utilities they regulate from the pole, rights-of-way and conduit access requirements set forth in the 1996 Telecommunications Act.[2]

Prior to the 1978 Pole Attachment Act, cable operators had sought relief from pole attachment abuses from state PSCs. Utilities had prevailed upon many of those state PSCs to disclaim jurisdiction over pole attachments on the theory that they were not regulated utility

[1]The Opposition filed today by Continental Cablevision, *et al.*, includes a full response to the space reservation concerns raised in the PG&E petition. CCTA supports that Opposition, and CCTA will not repeat the response here.

[2]See Petition for Reconsideration of PG&E at 3 - 5. CCTA also notes that similar arguments were made on reconsideration by other utilities in this proceeding. *See,* Petitions of American Electric Power Corp., *et al.* at 17; Edison Electric Institute/UTC at 16 - 17. To the extent that such similar arguments, if accepted, would apply in California, CCTA opposes these as well.

services.[3] As a result, the 1978 Pole Attachment Act provided a forum at the FCC, but afforded states with the opportunity to re-assert jurisdiction over pole rates through "reverse preemption."

By 1984, it was clear that many states had "certified" to rate authority when in fact they had no effective plan for actually regulating pole rates, terms, and conditions. As part of the 1984 Cable Act, Congress amended the Pole Act by adding Section 224(c)(3). That amendment requires that states which certified will nonetheless not be deemed to "regulate" pole rates, terms, and conditions unless they actually meet certain specific conditions.[4] As implemented by FCC rules, these conditions include a publicly available specific rate methodology and specific procedures for resolving such cases.[5] The Commission then wrote to each state that had certified under the old standard, laid out the conditions for recertification, and invited response. Some, but not all, states re-certified under the new standard. Those states meeting this standard are free to adopt pole rate formulae which depart from the FCC model. As a practical matter, many certified jurisdictions, including California, adopted the FCC model. [6]

The 1996 Telecommunications Act approaches access to poles, ducts, conduits and rights of way in a different manner. Unbundled access to such facilities is required independently as an obligation imposed on incumbent local exchange carriers ("ILECs") under Section 251 and as part of the "competitive checklist" test. With respect to electric utilities who profess not to

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[3]Communications Act Amendments of 1977: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 95th Cong., 1st Sess. at 38-40, 183 (1977).

[4]Cable Franchise Policy and Communications Act of 1984, H. Rep. 98-934, 98th Cong. 2d Sess. 96 (1984).

[5]47 C.F.R. §1.1414(a).

[6]Cal. Pub. Util. Code § 767.5.

be engaged in telecommunications, Section 224 imposes its own supplemental access requirements. However, as the Commission recognized in its *Interconnection Order*,[7] that "certification" over rate regulation does not automatically determine actual state regulation over pole *access*. The certification mechanism set forth in the Act deals only with rates. How a state may regulate *access* is another matter.

PG&E and others seek to preclude any recourse to the FCC in any state that has certified to rate regulation under the old standard. CCTA is not attempting to undo prior state certifications. In many cases, the state has adopted a methodology that is even *more* pro-competitive than the federal formula. In California, for example, Public Utility Code § 767.5 applies the current FCC pole rate formula to cable television companies for all attachments needed for wire communication, without distinguishing between video and telecommunications.[8] The Pole Act is intended to permit this kind of rate design in the states.

But the 1996 Act is *not* intended to bar recourse to federal access standards in states which only regulate rates. In some jurisdictions, there is neither clear statutory authority, nor implementing rules, under which the PSC could resolve pole access disputes in the manner required by the 1996 Act. Utilities' proposals that the prior certification by a state over pole rates is sufficient to erect such a bar is plainly wrong.

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[7] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 ¶ 1240 (released Aug. 8, 1996) (*"Interconnection Order"*).

[8] Similarly, newly enacted Michigan legislation, MCL 484.2361(5), requires all utilities which are themselves engaged in the telecommunications business to price pole attachments under the FCC's video rental formula.

The concept of mandatory access is entirely new to Section 224. State jurisdiction (and state certification) predicated on the old Section 224 simply does not extend to access questions arising under Section 224(f). The Pole Act states that Section 224(f) access issues may be resolved in states where such matters *are regulated by* the State. Congress specifically did not amend Section 224(c), as it could have, to sweep access matters into existing state certifications over the rates for attachment. On the face of the Act, prior certification has nothing to do with it.

CCTA is presently participating in a docket in California to adopt operating procedures under which such access disputes may be resolved at the California PUC.[9] But that is quite different from saying that none of the 1996 Act's access provisions would apply today in California, pending the adoption of such regulations. Nor would the Commission permit those final regulations to carve out California's regulated utilities from the Act's unbundling requirements,[10] or the competitive checklist,[11] or the imputation requirements of 224(g),[12] or the makeready rules of 224(i).[13] State access laws which fail to meet federal minima cannot trump federal law. Thus, PG&E's and others' petitions must be rejected as inconsistent with the Act.

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[9]Order instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, R-95-04-043 (Cal. PUC, filed Apr. 26, 1995).

[10]47 U.S.C. § 251(c)(3).

[11]47 U.S.C. § 271(c)(2).

[12]47 U.S.C. § 224(g).

[13]47 U.S.C. § 224(i).

The procedure that the Commission has specified[14] is one means to effect Congress' intent to ensure nationwide non-discriminatory access to essential public corridors. The Commission's approach gives individual states the ability to regulate such access questions consistent with the statute and in a way that advances telecommunications competition. Under those rules, every cable television operator and every telecommunications provider would be guaranteed an immediate adjudicative forum at the FCC. In the context of a specific case, it may be proven (by the utility or the state) that the state itself possesses procedures for adjudicating access questions. At that point, FCC jurisdiction over access matters cedes to the state. This approach is both consistent with Section 224, and with congressional intent of expedient, non-discriminatory access to poles, conduits and rights-of-way for the advancement of facilities-based competition.[15]

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[14]Specifically, the Commission found that:

> [U]pon the filing of an access complaint with the Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters. If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.

Interconnection Order at ¶ 1240.

[15]Among the purposes of the 1996 Act is to:

> provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.
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> S. REP. NO. 230, 104th Cong., 2d, Sess. 1 (Feb. 1, 1996).

This, however, is not the only method. The Commission also could choose to resolicit access "certifications" as it did in 1985, so long as the Commission made it clear to "certifying" states that local regulation must meet the prescribed federal minima outlined in the *Interconnection Order*, and that the Commission carefully examine and rule on any objections from interested parties to such "certifications."

Such caution is especially warranted in a competitive market where time is of the essence. In California, and elsewhere, cable operators, ILECs, electric utilities, municipal utilities and others are increasingly in competition with one another.[16] The incentives for utility pole owners to deny or delay access to cable operators and other third-parties to these essential facilities never has been greater. Indeed, in the most competitive markets where a cable operator or other telecommunications provider is racing to construct new facilities and sign up customers to compete with a utility pole owner, even a few weeks' delay in permit processing; in dispatching a work crew for pole replacements, transfers or facilities rearrangement; or even the imposition of excessive costs for such work forcing attaching parties into "negotiations" with the utilities over such costs, all can be tantamount to an outright denial.

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[16]For example, it was announced in January 1996 that yet another utility, Enova, the parent company of San Diego Gas & Electric, plans to roll-out data service telephones to customers in its electric service area. It was announced that the utility plans to provide as many as 30,000 of the $750 dataphones to San Diego Gas & Electric customers at little or no cost to such customers. *San Diego Utility Will Enter Phone Business,* Multichannel News, Jan. 29, 1996, at 33. In addition, Southern California Edison is entering the telecommunications business. It built an extensive fiber-optic network to "allow an on-line exchange of information" and is leasing part of its fiber-optic network to a telecom provider. Teresa Hansen, *Two-way Communications Promote Value-Added Services,* Electric Light & Power, June 1996, at 15. The City of Los Angeles Department of Water and Power is currently advertising its 4,000 mile fiber network available for telecommunications and Internet access.

In this kind of competitive market environment, *de facto* or actual access denial requires ***immediate*** expert resolution. CCTA submits that expert resolution lies only in this Commission or in a state which actually regulates access in accordance with federal minima.

CONCLUSION

For these reasons, the California Cable Television Association respectfully requests the Commission to deny the petition for reconsideration and clarification of the Pacific Gas & Electric Company and other utilities for the reasons set forth herein.

Respectfully submitted,

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